IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1189 of 2002
with
CIVIL APPLICATION No 3044 of 2003

and

FIRST APPEAL No 1190 of 2002
with
CIVIL APPLICATION No 3025 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ORIENTAL INSURANCE CO LTD.

Versus

MANJULABEN JAYANTIBHAI PATEL

Appearance:

1. First Appeal No. 1189 of 2002
MR KK NAIR for Petitioner No. 1
MR MTM HAKIM for Respondent No. 1-4
NOTICE UNSERVED for Respondent No. 5

CORAM : MR.JUSTICE N.G.NANDI
and

MR.JUSTICE M.S.SHAH

Date of decision: 20/06/2003

COMMON CAV JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

Since both these appeals as well as the civil applications involve common question of law about maintainability of the appeals filed by the Insurance Company under Section 173 read with Sections 149 and 170 of the Motor Vehicles Act, 1988, which preliminary contention is raised in the above numbered civil applications, the appeals as well as the civil applications are heard together and are being decided by this common order.

2. A motor vehicle accident took place on 9.6.1992 involving a tanker and a Maruti car resulting into the death of Jayantibhai, a passenger in the car, and injuries to Sanjay Ramanlal, driver of the car. The widow and minor children of Jayantibhai filed MACP No.911 of 1992 under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") claiming compensation to the tune of Rs.50 lacs. Sanjay Ramanbhai- driver of the car filed MACP No.1055 of 1992 under the same provision claiming compensation of Rs.3 lacs. Both the claim petitions were filed only against the driver, owner and Insurance Company of the tanker. The driver and owner of the tanker, though served, did not appear before the Tribunal but the Insurance Company - Oriental Insurance Company Ltd. contested the claim petitions by filing reply to the respective petitions and contended that the driver of the tanker was not negligent but the driver of the Maruti car was negligent and that the claimants were not entitled for any amount. The Tribunal framed following issues in each petition.

(i) Whether it is proved that the claimant sustained injuries/deceased died because of the rashness and negligence on the part of the driver of the vehicle involved in the accident ?

(ii) What amount the claimant is entitled to by way of compensation and from which of the opponents ?

(iii) What order ?

The first issue in each claim petition was answered in the affirmative.

As far as the quantum of compensation is

concerned, the Tribunal awarded Rs.21,28,000/- to the claimants in the fatal accident case from all the opponents i.e. the driver, owner and Insurance Company of the tanker. In personal injury case, the Tribunal awarded compensation of Rs.2,70,500/- to be recovered from the same opponents.

3. In MACP No.911 of 1992 i.e. in the fatal accident case, the Tribunal found that the deceased Jayantibhai, who was travelling as a passenger in the Maruti car, was aged about 45 years. He had obtained a degree in B.E. (Civil) in First Class with distinction and was doing business of construction since 1973. On the basis of the income-tax returns filed by him, which were placed on record, and after deducting the personal expenses which the deceased would have incurred on himself, and after taking into consideration the rise in future income, the Tribunal assessed the loss of dependency benefit at Rs.1,50,000/- per annum by way of loss of business income and also loss of agricultural income. The Tribunal applied the multiplier of 14 years purchase factor and awarded compensation of Rs.21 lacs under the head of compensation for loss of dependency benefit and another sum of Rs.25,000/- by way of compensation for loss of consortium and Rs.3,000/- as funeral charges i.e. the aggregate compensation amount of Rs.21,28,000/-.

In MACP No.1055 of 1992 also, the claimant was found to be possessing a Degree of B.E. (Civil) with distinction and he was also doing the business of construction. The Tribunal found that the said claimant had suffered multiple injuries and there was multiple surgery on face, resulting into disfigurement as well as restriction in movement and there was also defect in the vision in right eye and the eye has gone inside (enophalmas) and accordingly the disability as per the disability certificate was assessed at 10% and it was assessed as 5% for the body as a whole. In view of two weeks of hospitalization at the Jaslok Hospital, Bombay, and the expenses incurred, the Tribunal awarded Rs.71,000/- as medical charges and Rs.10,000/- as compensation for loss of past income. As far as the compensation for future loss of income is concerned, the Tribunal assessed the annual income at the rate of Rs.2 lacs per annum (as the claimant was only 24 years old at the time of the accident and was earning Rs.60,000/- per annum). Applying 5% disability as aforesaid, the loss of future income was assessed at Rs.10,000/- per year and multiplier of 16 years was applied, resulting into compensation of Rs.1,60,000/- under the head of loss of

future income. An amount of Rs.25,000/- is awarded under the head of compensation for pain, shock and sufferings. After adding miscellaneous amounts like special diet and transportation, the Tribunal awarded total compensation of Rs.2,70,500/-.

In both the claim petitions, the Tribunal also directed the opponents to pay compensation amount with proportionate costs and with interest at the rate of 9% per annum from the date of the claim petition till payment.

4. Aggrieved by the aforesaid common judgment dated 31.1.2002 and the consequential awards, the Insurance Company of the tanker (original opponent No.3) has preferred these appeals.

5. It appears that when the appeals came up for admission hearing, the respondent-claimants had raised a preliminary contention against maintainability of the appeals relying on the decision of the Apex Court in Shankarayya & Anr. vs. United India Insurance Co. Ltd., 1998 (3) SCC 140. However, in view of the subsequent decision of the Apex Court in United India Insurance Co. Ltd. vs. Bhushan Sachdeva Ors., 2002 (2) SCC 265, a Division Bench of this Court admitted the appeals.

6. The respondent-original claimants have thereafter filed the above numbered civil applications contending that in view of the decision of the Apex Court in National Insurance Co. Ltd. vs. Nicoletta Rohtagi & Ors., 2003 (1) GLH 586 = 2002 (7) SCC 456 = 2002 (7) JT 251 rendered by a larger Bench and overruling the decision in United India Insurance Co. Ltd. vs. Bhushan Sachdeva (supra), the appeals are not maintainable because the appeals merely challenge the findings of the Tribunal on the question of negligence and quantum of compensation without raising any statutory defence available to the Insurance Company under sub-section (2) of Section 149 of the Act.

In neither of the two cases covered by the common judgment of the Tribunal, the appellant-Insurance Company had obtained any permission under Section 170 of the Act and, therefore, it is contended that it is not open to the Insurance Company to challenge the awards on any grounds other than the defences available under Section 149(2) of the Act.

7. Mr KK Nair, learned counsel appearing for the

Insurance Company is not in a position to dispute the fact that the Insurance Company has challenged the awards of the Tribunal only by challenging the findings on the question of negligence and on the question of quantum of compensation but the learned counsel has made the following submissions:-

"(i) The appeals have been admitted and, therefore, despite the fact that there was no permission obtained under Section 170 of the M.V. Act, this Hon'ble Court in the interest of justice, can justifiably consider as to whether the impugned award in each case is JUST or SEEMINGLY UNJUST. It is well settled that in accident cases, compensation awarded should be JUST. It should be neither arbitrary nor fanciful. A perusal of the awards in the present cases would show that they are SEEMINGLY UNJUST.

(ii) Now coming to Section 170 of the M.V. Act, the heading thereof is very significant. The section comes into play in only certain cases, as for example, the Tribunal treating a report made by the Police under Section 158(6) of the Act as a claim petition or a claim petition filed in the prescribed form Comp.A where in cl. 9(c) the name and address of the insurer are required to be given. In such cases when the Tribunal embarks upon an enquiry and during the course of such enquiry, if the Tribunal is satisfied that the two grounds or any one of them as contained in Section 170(a) or (b) exist, the Tribunal has to pass a reasoned order to implead the insurer and on such impleadment, the insurer who was, theretofore not arraigned as a party opponent shall get the right to contest the claim on all aspects. The section does not postulate giving of an application by the insurer as it is the Tribunal which has on its own to implead the insurer a party-opponent during the course of the enquiry. However, if the insurer is already made a party-opponent by the claimants, then during the course of the enquiry, if either both or any one of the grounds mentioned in Section 170 (a) or (b) exist, then it is for the Tribunal, on its own, to permit the insurer to contest the petition on all aspects for which no order reasoned or otherwise, is provided by the statute. It may be noted that ground (b) given in Section 170 is the failure of the party to contest of which a judicial notice can be taken

by the Tribunal, when the party does not appear much less contest the matter. This the Tribunal has done in the present case by permitting the insurer who was the only opposite party appearing and contesting, to cross examine, make submissions and thereafter by adjudicating the case on the basis of such submissions.

If the section is read otherwise than what it conveys by its plain and unambiguous language, the entire concept of FAIR AND JUST COMPENSATION in a given case like the present ones will be defeated."

8. As far as the first submission regarding "unjustness of the award" is concerned, that is merely begging the question because the controversy - whether the award made by the Tribunal is just or unjust can be examined only if the appeal filed by the Insurance Company is maintainable. Hence Mr Nair has strongly pressed the second submission regarding interpretation of provisions of Section 170 of the Act.

Mr Nair has vehemently contended that Section 170 does not postulate giving of an application by the insurer and that existence of either of the two grounds as specified in clause (a) or (b) in Section 170 of the Act is sufficient to enable the Insurance Company to contest the claim proceedings on the question of negligence as well as on the question of quantum of compensation. It is submitted that since the insurance company was the only opposite party appearing and contesting, and the Tribunal had permitted the Insurance Company to cross-examine the claimants and their witnesses and to make submissions on the question of negligence and on the question of quantum of compensation, there was no need for Insurance Company to make an application under Section 170 of the Act for seeking permission to contest the claim proceedings even without raising any defences under Section 149(2) of the Act.

9. Section 170 of the Act reads as under:-

"170. Impleading insurer in certain, cases. Where in the course of any inquiry, the Claims Tribunal is satisfied that -

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed, to contest the claim, it may, for reason to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

10. Having carefully heard the learned counsel for the parties and having carefully gone through the decision in National Insurance Co. Ltd. vs. Nicolletta Rohtagi & Ors., 2002 (7) SCC 456, we find considerable substance in the submissions made on behalf of the original claimants that the present appeals filed by the Insurance Company for challenging the award by assailing the finding of negligence and the finding on the quantum of compensation are not maintainable because the larger Bench of the Apex Court has already held in National Insurance Co. Ltd. vs. Nicolletta Rohtagi & Ors. (supra) as under:-

"(u)nless an order is passed by the Tribunal permitting the insurer to avail the grounds available to an insured or any other person against whom a claim has been made on being satisfied of the two conditions specified in Section 170 of the Act, it is not permissible to the insurer to contest the claim on the grounds which are available to the insured or to a person against whom a claim has been made."... ....

"The view taken in United India Insurance Co. Ltd. vs. Bhushan Sachdeva & others (supra) that a right to contest would also include the right to file an appeal is contrary to well established law that creation of a right to appeal is an Act which requires legislative authority and no Court or Tribunal can confer such right, it being one of limitation or extension of jurisdiction."

"(u)nless the conditions precedent specified in Section 170 of the Act are satisfied, an Insurance Company has no right of appeal to challenge the award on merits. However, in a situation where there is a collusion between the claimants and the insured or the insured does not

> contest the claim, it is open to an insured to seek permission of the Tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits, in that case it is open to the insurer to file an appeal against the award on merits, if aggrieved. In any case where an application for permission is erroneously rejected the insurer can challenge only that part of the order while filing appeal on grounds specified in sub-section (2) of Section 149 of the Act. But such application for permission has to be bona fide and filed at the stage when the insured is required to lead his evidence. So far as obtaining compensation by fraud by the claimant is concerned, it is no longer res integra that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of the award."

(emphasis supplied)

11. The aforesaid principles laid down by the Apex Court after analyzing the scheme of the Motor Vehicles Act, 1939 as well as the scheme of the Motor Vehicles Act, 1988 and several decisions make it abundantly clear beyond any pale of controversy that an Insurance Company cannot file an appeal against the award of the Tribunal for challenging the findings of negligence and on quantum of compensation, unless the Insurance Company had made an application before the Tribunal under Section 170 of the Motor Vehicles Act, 1988 and a specific order was made by the Tribunal in writing permitting the insurer to avail the grounds available to an insured or any other person against whom the claim has been made.

The decision of the larger Bench in National Insurance Co. Ltd. vs. Nicolletta Rohtagi (supra) has completely concluded the controversy and it is not open to this Court to circumvent the said binding decision by culling out any implied permission of the Tribunal in favour of the Insurance Company as is sought to be contended by the learned counsel for the appellant-Insurance Company.

12. In Shankarayya vs. United India Insurance Co. Ltd., 1998 (3) SCC 140, which came to be approved by the larger Bench in National Insurance Co. Ltd. (supra), only the Insurance Company had filed the written

statement contesting the claim petition on merits and also indicating its desire to avail of the permission under Section 170 of the Act without expressly praying for it through an application. The Apex Court considered an identical contention regarding implied permission under Section 170, which came to be rejected in the following terms:-

"Learned Counsel for the appellants was right when she contended that as the first respondent Insurance Company did not move under Section 170 of the Motor Vehicles Act, it was not entitled to challenge the compensation on merits and only statutory defence was available to the Insurance Company. It is true that Respondent 1 was allowed to contest on merits despite not following the procedure laid down under Section 170 of the Act and as a result the compensation claim of Rs.2,60,000/- was not granted in full and only Rs.1,05,000/- was granted to the claimants. To that extent on the contest of the Insurance Company on merits this much benefit was made available to the Insurance Company and that, of course, could not be gone behind by the claimants as the claimants were satisfied with the award of the Tribunal not decreeing their full claim. Therefore, the only contest in the appeal was by the Insurance Company which wanted the award of the Tribunal to be further reduced and that is exactly what the High Court has done. In our view, the Insurance Company was clearly incompetent to file an appeal on the merits of the claim before the High Court. .. .. the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the section are found to be satisfied and for that purpose the Insurance Company has to obtain order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true that the claimants themselves had joined Respondent 1, Insurance Company in the claim petition but that was done with a view to thrust the statutory liability on the Insurance Company on account of the contract of the insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence

on merits on being satisfied on the aforesaid two conditions mentioned in Section 170. Consequently, it must be held that on the facts of the present case, Respondent 1, Insurance Company was not entitled to file an appeal on merits of the claim which was awarded by the Tribunal."

(emphasis supplied)

The submission of Mr Nair for the Insurance Company regarding maintainability on the basis of implied permission must also, therefore, fail.

13. In the result, both the civil applications are allowed and it is held that the first appeals filed by the Insurance Company against the common judgment dated 31.1.2002 passed by the Motor Accident Claims Tribunal, Bharuch in MACP Nos 911 and 1055 of 1992 are not maintainable, as the Insurance Company had not made any application, and the Tribunal had not passed any order, under Section 170 of the Act for permitting the Insurance Company to avail the grounds available to an insured or to the driver. Both the civil applications are accordingly allowed. Rule is made absolute.

14. As a consequence of the above order, it is held that First Appeal Nos. 1189 and 1190 of 2002 are not maintainable and are accordingly liable to be dismissed as not maintainable. The appeals are accordingly dismissed as not maintainable.

(N.G. Nandi, J)

(M.S. Shah, J)

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